IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE.

CRIMINAL APPEAL NO. 537 OF 1993.

The State of Maharashtra ..Appellants.

vs.

1. Laxman Ganpat Lalage.
2. Chandrakant Shivram Kokate.
3. Dattatraya Nivruti Kokate.
4. Subhash Nivruti Kokate.
5. Jagdish Chandrakant Kokate.
6. Ramesh Shivraj Shivpuje.
7. Subhash Vishwasrao Fate. ..Respondents.
8. Nagnath Daji Nagane.

Shri A.S. Shitole, A.P.P. for the State.

Shri A.P. Mundargi,Senior Counsel with Shri Viwal Agandsurve for respondents.

CORAM: V.M.KANADE,J.
DATED: 10th February 2005.
&
15th February 2005.

ORAL JUDGMENT:

1. Heard learned A.P.P. for the State and learned Counsel appearing on behalf of respondent Nos. 1 to 8.

2. This appeal has been filed by the State seeking enhancement of the sentence imposed by the trial Court against the respondents-accused. Learned Counsel appearing for the respondent-accused submits

that while considering this appeal filed by the State, his submissions on behalf of the respondents seeking acquittal of the respondents-accused may also be considered in view of section 377 sub-clause (3) and section 386(c) of the Criminal Procedure Code, 1973.

3. Brief facts of the case are that a complaint was filed by P.W. 6- Sambhaji Namdeo Kokate on 3.11.1989 in which he alleged that he along with his friend Laxman Chavan, Chandrakant Yadav, Mittu Shinde and Popat Hande were going to the Court for the purpose of giving attendance in a criminal case which was launched against them. In the said complaint he has stated that while they were proceeding to Court, after having met Ramdas Kokate in the afternoon at about 3 p.m. when they had reached Lokseva Lodge, at that time a jeep came out of the lodge. This jeep was being driven by subhash Fate and it straightway dashed all these 5 persons and as a result of the said dash, all of them fell down on the road. The jeep thereafter went little ahead and stopped and Subhash Fate and the others got down from the jeep with sword and knife and then assaulted the said Popat Hande. The complainant and his friends ran away from the spot and went to Mohol Police Station and informed the police about the said incident. Police then came at

the scene of offence and took Popat Hande and the complainant to the hospital. Complaint was registered by Shivaji Shankar Halge at the police headquarter while Crime No. 138/1989 was registered against all the accused. In the said complaint it was stated that there was rivalry between the complainant and other injured persons and the accused due to Grampanchayat election which was held prior to the incident. The injured Popat was treated at Mohol in a public hospital and thereafter he was taken to Solapur Hospital for treatment. The other injured persons were treated at Mohol in Primary Health Centre. The investigating officer prepared the spot panchanama with the help of panchas and recorded statements of 7 witnesses. Charge-sheet was filed against the accused. The trial Court convicted the accused for having committed offences punishable under sections 147, 148, 149, and 307 of the Indian Penal Code read with section 37(1) and section 135 of the Bombay Police Act and sentenced them to suffer R.I. for 3 years. The State has preferred this appeal for enhancement of the sentence. The respondents- accused have also preferred appeal against the judgment and order passed by the Assistant Sessions Judge, Solapur.

4. Learned Counsel appearing on behalf of the

respondent has submitted that he would withdraw the appeal which is filed by the respondent in the lower appellate Court and undertaking to that effect is filed on behalf of one of the accused, original accused No.8,who is present in Court. Undertaking is accepted.

5. I have heard learned A.P.P. appearing on behalf of the State. Learned A.P.P. has submitted that sentence against respondents was liable to be enhanced. Learned Counsel for the respondents submitted that respondents were liable to be acquitted of the offences with which they were charged.

6. Learned Counsel for the respondents has produced death certificate of the original accused No.7- Subhash Vishwasrao Fate which is signed by Gram Panchayat Officer, Mohol. Xerox copy of the said certificate is given to the learned A.P.P.In this certificate dated 31.1.2005 it is stated that Subhash Vishwasrao Fate died on 10.4.2002 at Mohol at his residence. Since this fact is not yet verified I shall proceed to hear the appeal on the basis that original accused No.7 is still alive. However, if it is verified by the learned A.P.P. that respondent No.7 has in fact died on the date mentioned in the

death certificate, appeal so far as original accused No.3 is concerned, shall stand abated.

7. Section 377 sub-clause (3) of the Code of Criminal Procedure reads as under:

> " When an appeal has been filed against the sentence on the ground of its inadequacy, the High Court shall not enhance the sentence except after giving to the accused a reasonable opportunity of showing cause against such enhancement and while showing cause, the accused may plead for his acquittal or for the reduction of the sentence."

Similarly, section 386 sub clause (c) reads as under:

> " in an appeal for enhancement of sentence-
> (i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court competent to try the offence, or
>
> Iii) alter the finding maintaining the sentence, or
>
> (iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;"

From the aforesaid provisions, it is abundantly clear that the respondent-accused is entitled to argue while showing cause in an appeal filed by the State for enhancement of the sentence and plead for his acquittal or for reduction in sentence and it is not

necessary that he should file any separate appeal for that purpose.

8. The prosecution has, in the present case examined 17 witnesses. P.W. 6- Sambhaji Kokate, P.W.8-Chandrakant Yadav and P.W.14-Popat Hande have witnessed the said incident and also have been injured in the assault. P.W.6- Sambhaji Kokate has stated in his evidence that Grampanchayat elections were held on 25.9.1989 and there were 2 parties in the election. One party led by Ramdas Kokate and other led by Subhah Phate. In the said election, 6 candidates from Ramdas Kokate's party were elected and 3 candidates from the party of Subhash Phate were elected. P.W.6-Sambhaji Kokate was also elected in the said election and Sarpanch was elected from the party of Ramdas Kokate. He has further stated that relation between 2 groups was strained and a complaint was filed against him and other members of his party. On 13.10.1989 this complaint was filed against Popat Hande, Laxman Chavan, Chandrakant Yadav, Sudam Nagane, Abhiman Kokate, Udhav Kokate, Dronacharya Kokate and this witness himself and these persons were arrested in connection with the said complaint and were released on bail. He has further stated that they were called upon to remain present in Court on 3.11.1989. He has

stated that accordingly, he along with others went to the bungalow of Ramdas Kokate at Mohol at about 10.30 a.m. in the morning and thereafter at about 3 p.m. they were proceeding to go to Mohol Court from the bungalow of Ramdas Kokate and while they were passing from Lokseva Lodge, they just came ahead of that lodge, from that direction one jeep came to the direction where they were walking. This jeep was driven by subhash Phate who came in great speed and dashed all the 5 persons, who were proceeding. As a result of the dash given by the jeep, all of them fell down on the road. This witness has further stated that after jeep gave dash to these 5 persons it went ahead and stopped after travelling for some distance and thereafter, Subhash Phate- original accused No.7, Ramesh Shivpuje-accused No.6 came out of the jeep with swords and others viz., Laxmam Lalage, Dattatraya Kokate, Jagdish Kokate came out with Rampuri knives. This witness has specifically stated in his evidence that out of 6 persons who came out of the jeep, Subhash Fate -original accused No. 7 and accused No.6 Ramesh Shivpuje started giving blows with their swords on the legs and hands of Popat Hande and also his stomach. He further stated that other persons were instigating those two accused to assault them. He thereafter went to Mohol Police Station and police

came to the scene of offence and Popat was taken to the Government dispensary. P.W. 8- Chandrakant Yadav has also stated regarding strained relations between the parties and has also narrated about the dash given by the jeep which was being driven by Subhash Phate.. He has also narrated that Subhash Phate and Ramesh Shivpuje, accused Nos. 7 and 6 respectively assaulted Popat Hande on his hands feet and stomach with sword and rest of the accused have stabbed these persons. P.W.4- Popat Hande has also corroborated the version about the incident as narrated by these witnesses in respect of assault by Subhash Phate and Ramesh Shivpuje, and he has stated that rest of the accused instigated these 2 persons.

9. All these three witnesses have admitted in the cross-examination that the versions given by them about instigation given by other accused is an improvement and that these versions was not given by them to the police when their statements were recorded at the police station. From the evidence of these 3 witnesses who are eye witnesses to the said incident and who are also injured in the said incident have stated that relations between the two parties were strained. The complainant and others were proceeding to go to the Court in connection with a criminal case

which was filed by the accused against these witneses and that the jeep which was driven by Subhash Phate gave dash to all the 5 persons who were proceeding to go to the Court and thereafter, original accused No.7 Subhash Phate and accused No.6- Ramesh Shivpuje assaulted Popat Hande with swords and original accused Nos. 1,2 and 3 got down from the jeep and were armed with Rampuri knives and other accused viz. accused Nos. 4,5 and 8 continued to sit in the jeep.

10. From the above evidence, it can be seen that that no role has been attributed to the accused Nos. 4,5 and 6 as they were sitting in the jeep at the incident. Regarding instigation by those accused Nos. 1,2,3, 4,5 and 8 is clearly an improvement admitted by the witnesses in the cross-examination., It can also be seen from the F.I.R. the theory of instigation does not appear in the complaint which was recorded by P.W.8. In view this, the prosecution has failed to establish any role or act on the part of accused Nos. 1,2,3, 4,5 and 8.

11. From the evidence on record, it is difficult to come to the conclusion that all these persons had committed any overt act in the said incident. It cannot be said that intention of original accused

No.7- Subhash Fate which was to injure these witnesses by giving them dash with jeep was shared by other occupants of the jeep. It is difficult to suggest that this intention of original accused No. 7 was shared by other accused. So far as accused Nos. 4,5 and 8 are concerned, according to the prosecution witnesses themselves, they got down from the jeep but assault was by accused Nos. 7 and 6. The trial Court, in my view, has erred in coming to the conclusion that the rest of the accused were members of unlawful assembly and, therefore, they shared common object and intention. In the absence of any evidence to show that respondent Nos. 4,5 and 8 were sitting in the jeep, shared the intention of accused Nos. 6 and 7 it is difficult to come to the conclusion that they have committed offence punishable under section 149 of the Indian Penal Code. In my view, the prosecution has failed to establish any offence against original accused Nos.4, 5,6 and 8 and, therefore, they are liable to be acquitted.

12. So far as original accused Nos. 1,2, and 3 are concerned, from the evidence of the eye witnesses it can be seen that they have deposed that after dash was given by the jeep which was driven by accused No. 7, accused Nos. 1,2 and 3 got down from the jeep and

they were carrying rampuri knives and iron bar. They have, however, not participated in the assault on Popat Hande, who was assaulted with sword by Subhash Phate and Ramesh Shivpuje. The theory of instigation by these accused is an afterthought and an improvement. From the evidence it can be seen that Subhash Phate and Ramesh Shivpuje had singled out Popat Hande and they were assaulting him with sword when neither of these two accused- Subhash Phate and Ramesh Shivpuje nor other accused assaulted other injured persons. On the contrary, accused Nos. 1,2 and 3 were sitting in the jeep, while accused Nos. 6 and 7 were assaulting Popat Hande. From the evidence of the eye witnesses it cannot be said that these 3 accused shared common object of accused Nos.6 and 7 and as such, no over overt act is attributed to these 3 accused, merely because they had accompanied these 2 accused, it cannot be said that they shared common object of other two accused. In these circumstances, in my view, the prosecution has failed to establish that accused Nos.1,2 and 3 have committed an offence punishable under sections 144, 145 or section 34 or section 307 read with 34 of the Indian Penal Code. These accused therefore, have to be acquitted of the offences with which they were charged.

13. The only question which falls for consideration of this Court is what offence has been committed by the accused Nos. 6 and 7. For that purpose, it will be necessary to consider the evidence of 2 Doctors who are examined by the prosecution. The prosecution in support of its ocular evidence have examined two Doctors P.W.3- Dr. Sidramappa Kore and P.W.13- Dr.Ashok Ramchandra Kulkarni. P.W. 3was working as Medical Officer in the Primary Health Centre at Mohol. He has stated in his evidence that on 3.11.1989 at about 3.15 p.m. Popat Hande was referred to him by Police Station, Mohol. He has stated that after examination of the said witness he found that there were 12 injuries on the person of Popat Hande. He has described those injuries as under:

1. Incised wound on right forearm posterior, 4" x 2" to bone deep.

2. Incised wound on right fore arm 3" x 2" into muscle deep.

3. Incised wound over right side of Epgastrium 7 cm. x 2 cm. x muscle deep.

4. Incised wound left fore arm 5 cm. x 1 1/2cm. muscle deep.

5. Incised wound 4 cm. x 1cm x muscle deep.

6. Incised wound on left fore arm 3cm. x1 cm.x muscle deep on left fore arm.

7. Incised wound on left fore arm over lower 1/3 8 cm. x 3 cm.x bone deep.

8. Incised wound at junction of middle 1/3rd lower 1/2 of right leg on right lower leg 8cm x 3 cm bone deep.

9. Incised wound at junction of middle 1/3rd lower 1/3 of left lower leg 8 cm x 3cm x bone deep.

10. Incised wound over left ankle joint 6 cm x 3 cm x bone deep.

11. Incised wound over right tibial tubero city. 3 cm x 2 cm x muscle deep.

12. Incised wound above left knee 2 cm x 1 cm x muscle deep.

14. He has stated that injury Nos. 4 and 6 were bleeding injuries. Rest of the injuries were non-bleeding injuries. He has stated that x-ray machine was not available at Mohol and hence, he was not in a position to decide what was the nature of the injuries. He has however, stated in his evidence that all the injuries were caused by hard and sharp object. He has further stated that he had examined Chandrakant Yadav, Mithu Shinde and Sambhaji Kokate and found that they had suffered abrasions on their body.

15th February 2005.

15. The prosecution has examined P.W.13-Dr.Ashok

Kulkarni. He has stated in his evidence that Popat Hande had sustained 11 injuries which he has described as under:

1. Incised wound:- 8x 3x 1/4 cm over right side of upper abdomen subcutaneous and bleeding present.

2. Injuries over right lower leg C.D.W.2.l

i) 7 x 3 cm bleeding present.

ii) C.D.W. 6x 2 cm bleeding present. Both muscle deep with compared fracture of Tibia and fibula at lower 1/3rd Injuries over left lower leg.

i) C.L.W. 7 x 2 cm x1 cm.

ii) C.L.W.3 x 2 x 1 cm bleeding present.

iii) 6 x 3 bleeding present with compound fracture Tibia and dibula.

Injuries were right upper lib i.e.

i) c.L.W. 4 x 1 cm bone deep at junction of upper thrid and middle third of fore arm.

(ii) C.L.W. on forzal aspect 3 x 1 cm with fracture of sharpradious and ulna upper half.

Injuries over left upper limb i.e.

(i) C.L.W. forearm 7 x 1 muscle deep.

(ii) C.L.W. dorzal aspect 5x 1 cm.

(iii) C.L.W. dorzal aspect of the lower forth arm with compound fracture, radious and ulna lower half.

He has stated in his cross-examination that injuries were caused by hard and blunt object. He has further

stated that the C.L.W. injuries may not be caused by blade of the sword. He has further stated that injured Popat hande has only suffered compound fracture.

16. From the evidence of these two witnesses, it appears that there is discrepancy in the description of the injuries which are mentioned in the certificate given by P.W. 3 and P.W.13. P.W.3- Dr. Kore has stated that there are 12 incised wounds which would have been caused by sword. P.W.13-Dr. Ashok Kulkarni has on the contrary stated that there were only 2 incised wounds and rest of the injuries were compound fracture and C.L.W. P.W.13-Dr. Kulkarni has stated that compound fracture could not have been caused by blade of sword. P.W.3- Dr.Kore has also stated in his cross-examination that there were only 2 bleeding injuries. Thus, there appears to be inconsistency regarding nature of injuries sustained by Popat Hande. Merely because there is inconsistency in the evidence of these 2 Doctors who are examined by the prosecution, it does not mean that the entire medical evidence should be discarded. P.W.3 has stated in his evidence that there was no x-ray machine available and, therefore, he could not make any reference to compound fracture which was found on the person of

Popat Hande. In any event, it can be seen that both the Doctors have stated that there were 2 incised wounds and bleeding injuries. All the witnesses have consistently deposed that accused No.7-Subhash Fate had dashed the vehicle on all the witnesses, as a result of which Popat Hande and others had received severe injuries. Original accused Nos. 6 and 7 thereafter got down from the vehicle and assaulted Popat Hande with sword.

17. Thus, in my view, the prosecution has clearly established that accused Nos. 6 and 7 were responsible for injuries which were caused on the person of Popat Hande-P.W.14. The only question which falls for consideration of this Court is whether offence under section 307 of the Indian Penal Code has been made out. In my view, considering the nature of injuries as deposited by P.W. 3 and P.W.13, it cannot be said that the accused either had an intention to cause said injuries which were ordinarily sufficient to cause death or had knowledge that such injuries were likely to cause death. All the witnesses have deposed that accused Nos.6 and 7 inflicted sword blows on the legs and hands of P.W.14-Popat Hande and there was one injury on the stomach. The intention was, thereore, certainly not to commit murder of Popat

Hande or even to attempt to commit murder of P.W.14. The prosecution, therefore, has not established that the accused Nos. 6 and 7 committed an offence punishable under section 307 of the Indian Penal Code. However, the two injuries which are sustained by P.W.14- Poapt Hande, in my view, leads to the conclusion that the prosecution has estabilised that the accused had committed an offence punishable under section 326 of the I.P.C.

17. The trial Court after having held that accused had committed an offence punishable under section 307, has sentenced them to suffer R.I. for 3 years. In my view, the trial Court has awarded proper sentence and there is no need to enhance the said sentence. In the result, the appeal is partly allowed.

18. The original accused Nos.1,2,3,4,5 and 8 are acquitted of the offence under section 307, 147, 148 read with section 149 and sectiion 37(1) read with sectiion 135 of the Bombay Police Act.

19. Original Accused Nos. 6- Ramesh Shivapuje and original accused No.7-Subhash Fate 7 are, acquitted of the offences punishable under section 147, 148, 307 r/w 149 of the Indian Penal Code and section 37(1)

read with section 135 of the Bombay Police Avy.

20. Original accused Nos. 6 and 7 are, however, convicted for the offence punishable under section 326 of the Indian Penal Code and are sentenced to suffer R.I. for 3 years. All the accused are, however, acquitted of the offence under section 147 and 148 of the I.P.C.

21. The original death certificate of Subhash Vishwasrao Fate is taken on record. The learned A.P.P. is not in a position to state whether original accused No.7 has in fact expired as alleged. If it is found that accused No.7 has expired as stated in the said certificate, appeal against original accused No.7 shall stand abated. If it is found to be incorrect, he has to complete the sentence awarded by the trial Court and confirmed by this Court.

22. Appeal is allowed in the above terms.